STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
SANDRA KASHOUH	)	
	)	
VS.	)	W.C.C. 00-02502
	)	
CRA-MAR NURSING HOME	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the petitioner/employee's appeal from a trial decision and decree which awarded her weekly benefits for two (2) periods of incapacity. The employee asserts that she is entitled to continuing benefits. After review of the record in this matter, we find merit in the employee's appeal and agree that she is entitled to ongoing weekly benefits for partial incapacity.

The employee filed an Original Petition alleging that she sustained a work-related injury to her back on February 19, 2000 while employed by the respondent which resulted in partial incapacity from April 21, 2000 and continuing. At the pretrial conference on August 4, 2000, the petition was granted and the employee was awarded weekly benefits for partial incapacity from April 22, 2000 to May 12, 2000 and from June 10, 2000 to June 19, 2000. The employee claimed a trial in a timely manner.

The parties stipulated to all of the findings of the pretrial order but for the length of disability. After hearing the testimony of the employee and reviewing various records, the trial judge found that the employee had established that she had established an earning capacity in March 2000 at least equal to her average weekly wage at the time of her injury because she was working at a less strenuous job. He concluded that she was only disabled from that less strenuous job from April 14, 2000 to May 24, 2000 and from June 10, 2000 to June 19, 2000, despite the fact that she was terminated from the job in August 2000. The employee filed this appeal asserting that the trial judge had no grounds for establishing an earning capacity and that she was entitled to ongoing weekly benefits for partial incapacity.

In February 2000, Ms. Kashouh was employed full-time by Providence Community Health Center as a patient service representative and was working as a certified nursing assistant for the respondent on a part-time basis. Shortly after the incident at work in February, she left Providence Community Health Center and began working at Roger Williams Hospital in a similar capacity. However, she was only there for two (2) weeks when she accepted another job offer from Neighborhood Health Plan and began working for that company on March 13, 2000.

The employee initially treated at Garden City Medical Treatment Center and was referred to Rhode Island Rehabilitation for physical therapy. She attended therapy sessions two (2) to three (3) times a week from March 7, 2000 to June 7,

2000, when she began treating with a chiropractor. Ms. Kashouh testified that she was out of work for two (2) weeks in April on the advice of the chiropractor. She worked for two (2) weeks, but then was taken out of work for two (2) weeks again in May. She testified that she continued to work but she had difficulty sitting all day because she would develop numbness in her right leg and pain in her right buttocks and low back. She was terminated by Neighborhood Health Plan as of August 1, 2000 due to excessive absences and poor work performance.

It is evident from the testimony that the employee was a rather poor historian with regard to dates. She had difficulty recalling exactly when she worked or was out of work. Unfortunately, the parties never cleared this up and the court is left to glean what information it can from the records provided. Those records include the records of Rhode Island Rehabilitation Institute, two (2) reports of Dr. A. Robert Buonanno, the deposition and records of Dr. Sidney P. Migliori, and the records of Neighborhood Health Plan of Rhode Island.

The Rhode Island Rehabilitation Institute notes from April 24, 2000 indicate that the employee had seen her doctor the Friday before and was out of work for two (2) weeks. There is a work status note from Dr. Tarek Wehbe, the employee's primary care physician, in the records of Neighborhood Health Plan stating that the employee is unable to work from April 21, 2000 to May 4, 2000 due to a lumbar back sprain. It appears that the employee returned to work around May 8, 2000. On May 22, 2000, she reported that sitting at work all day is her "greatest challenge."

On May 18, 2000, Ms. Kashouh saw Dr. A. Robert Buonanno, an orthopedic surgeon. He noted spasm and tenderness in her right lower back with positive straight leg raising on the right. His diagnosis was a resolving lumbar radiculopathy in the right leg. The doctor indicated that the employee has been working for two (2) weeks and can continue to work while undergoing physical therapy. The therapy notes for June 7, 2000 state that Dr. Wehbe has suggested a chiropractor and that the employee was unable to work that day because of the pain. At the next therapy session, the employee reported that she saw the chiropractor on June 8, 2000 and she was told not to work for two (2) weeks. At that point, the employee was discharged from physical therapy.

Dr. Buonanno saw the employee again on June 29, 2000. At that time, she had begun treatment with a chiropractor and was taking pain medication and an anti-inflammatory. He noted that she was not a surgical candidate and discharged her from his care.

Dr. Sidney Migliori began treating the employee on June 27, 2000. The employee noted difficulty sitting. The doctor's diagnosis was a lumbar strain with questionable right radicular pathology. Dr. Migliori testified that the condition was causally related to the incident at work based upon the history provided by the employee. She also indicated that the employee was not capable of working as a CNA due to the effects of the work injury. A lumbar MRI and EMG and nerve conduction studies of the lower extremities were unremarkable. The doctor modified the diagnosis to a lumbar strain and S1 joint strain. As of October 3,

2000, she maintained that the employee could not return to her former position as a CNA. There is no indication in the doctor's reports or in her testimony that she was aware of the employee's more recent job duties as a customer service representative at the Neighborhood Health Plan and the doctor was not questioned as to whether the employee was capable of performing those duties.

The most informative record as to the employee's time out of work is the termination memorandum to the employee from Neighborhood Health Plan. In this two (2) page memorandum, the employer listed how many hours worked and how many hours taken out of work for each week by the employee. The document shows that the employee did not work at all the weeks ending April 28, 2000 and May 5, 2000. She worked a full week of 37.5 hours the following week, but then was out a few hours the next week and at least one full day each of the next three weeks. Ms. Kashouh did not work the week ending June 16, 2000 or any time thereafter according to the memorandum. She was terminated effective August 1, 2000.

In summary, these records reveal that Ms. Kashouh was out of work initially from March 3 to March 6. It was around this time that she was changing her full-time jobs. On March 13, 2000, she began her employment at Neighborhood Health Plan. It appears that she continued to work for the respondent as well. According to a note from Dr. Wehbe, the record from Neighborhood Health Plan and the physical therapy notes, the employee stayed out of work from April 21, 2000 to May 4, 2000. On June 7, 2000, Ms. Kashouh informed her physical

therapist that she did not work that day due to back pain. The next day, she saw the chiropractor, who took her out of work for two (2) weeks. The records of Neighborhood Health Plan indicate that she never returned to work after the week ending June 9, 2000. Dr. Migliori testified that the employee has been unable to perform the duties of a CNA since June 27, 2000.

Pursuant to R.I.G.L. § 28-35-28(b), a trial judge's findings on factual matters are final unless found to be clearly erroneous. The Appellate Division is permitted to conduct a *de novo* review of the record only after finding that the trial judge was clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). The employee filed three (3) reasons of appeal in this matter. The first reason contends that the trial judge improperly established an earnings capacity in direct contravention of the mandates of R.I.G.L. § 28-29-2(3)(i). After review of the record and the applicable law, we agree and find that the trial judge was clearly wrong in setting an earning capacity. Because of our decision regarding the first reason of appeal, we find no need to address the remainder of the employee's arguments.

Rhode Island General Laws § 28-29-2(3)(i) provides the methods of setting an earnings capacity.

> "'Earnings capacity' means the weekly straight time earnings which an employee could receive if the employee accepted an actual offer of suitable alternative employment. Earnings capacity can also be established by the court based on evidence of ability to earn, including, but not limited to, a determination of the degree of functional impairment and/or disability, ...

> In the event that an employee returns to light duty employment while partially disabled, an earnings capacity shall not be set based upon actual wages earned until the employee has successfully worked at light duty for a period of at least thirteen (13) weeks."

The first sentence of this provision deals with the situation where an employee refuses an offer of suitable alternative employment under R.I.G.L. § 28-33-18.2. In the event of a refusal, the court is authorized to set an earnings capacity equal to what the employee would have earned if the offer had been accepted. There is no evidence in this matter that the employee refused an offer of suitable alternative employment.

In the present matter, the trial judge found that the employee had established an earnings capacity based upon the fact that she was able to earn wages equal to her pre-injury average weekly wage when she worked a full week at the lighter job at Neighborhood Health Plan, even though she was unable to return to her job as a certified nursing assistant at Cra-Mar Nursing Home. However, Section 28-29-2(3)(i) provides that when an employee returns to a light duty job while partially disabled, an earnings capacity cannot be set based upon wages from that job until the employee works at least thirteen (13) weeks. The record reveals that Ms. Kashouh did not work for thirteen (13) weeks at Neighborhood Health Plan.

The documentation in the record indicates that Ms. Kashouh worked at her light duty job at Neighborhood Health Plan from March 13, 2000 to April 20, 2000 and then from May 5, 2000 to June 9, 2000. During the second period of

work from May to June, she only worked one (1) full week out of five (5) weeks. The employee was kept on the books and was not terminated by Neighborhood Health Plan until August 1, 2000, but the records indicate that she had not received any wages since June 9, 2000. Based on the information in the record, the employee did not receive wages in this light duty position for a thirteen (13) week period. Consequently, there is no basis for setting an earning capacity.

The requirement that the partially disabled employee work for at least thirteen (13) weeks before setting an earning capacity based on wages earned in that employment provides some basis for determining that the employee is physically capable of maintaining employment on a regular basis. There are situations in which an injured employee may attempt to return to work in a lighter job, but the physical demands are too great and he or she is forced to stop working. The thirteen (13) week requirement provides a sufficient trial period for the injured worker to attempt a return to a lighter job. The evidence in the present matter establishes that the employee was absent from work due to the effects of her work injury and not from an independent cause such as illness or the effects of a motor vehicle accident.

We are aware of the statutory provisions and case law which prohibit an employee from receiving weekly benefits when her post-injury earnings exceed her pre-injury average weekly wage. However, the specific provision of Section 28-29-2(3)(i) is the only authority for setting an earnings capacity which would limit or eliminate the payment of weekly benefits until further order of the court

or agreement of the parties. It should be noted that we are not permitting the employee to obtain a windfall. Pursuant to R.I.G.L. § 28-33-18(a), the employer is entitled to take credit for wages earned in calculating the amount of weekly partial incapacity benefits to be paid to the employee.

Based upon the evidence in the record, we find that the trial judge erred in finding that the employee had established an earning capacity with her employment at the Neighborhood Health Plan. Therefore, we sustain the employee's appeal and reverse the decision of the trial judge in that regard.

It should be noted that initially, the trial judge had included an award for reimbursement of costs and a counsel fee in his proposed decree based upon his mistaken belief that the employer had filed a claim for trial. The trial judge corrected this error on his motion prior to entry of the decree and an amended decree was entered which did not contain those awards. Consequently, the amount of the counsel fee that the trial judge was prepared to award is available in the record. In light of the employee's success on appeal, we will reinstate the award of costs and the counsel fee for services rendered at the trial level.

In accordance with our decision, a new decree shall enter containing the following findings and orders:

1. The petitioner has demonstrated, by a fair preponderance of the credible evidence, that she sustained a work-related injury on February 19, 2000, arising out of and in the course of her employment, connected therewith and referable thereto, of which injury the respondent had knowledge.

2. At the time of her injury, the petitioner was employed as a certified nursing assistant, and she sustained her injury while lifting a patient who had fallen.

3. The injury sustained by the employee was a lumbosacral strain and a question of right sacroiliac joint strain.

4. The employee's average weekly wage at the time of her incapacity was Two Hundred and Eighty-three Dollars and 06/100 ($283.06).

5. The employee has demonstrated by a fair preponderance of the credible medical evidence that she was partially incapacitated from April 21, 2000 and continuing.

6. At the time of her injury, the employee had two (2) persons dependent upon her for support.

7. The employee received some Temporary disability Insurance benefits and a lien has been filed in favor of the Rhode Island Temporary Disability Insurance Fund.

It is, therefore, ordered:

1. The employer shall pay workers' compensation benefits for partial incapacity from April 21, 2000 and continuing until further order of the court or agreement of the parties.

2. The employer shall pay all reasonable medical, hospital and surgical benefits as required under the terms of the Rhode Island Workers' Compensation Act.

3. The employer shall be entitled to credit for all sums paid to the employee pursuant to the terms of a pretrial order and trial decree previously entered in this matter.

4. That the respondent/employer and/or its insurance carrier shall reimburse the Director for the Rhode Island Temporary Disability Insurance Fund in accordance with the provisions of R.I.G.L. §28-41-6(3), and shall be entitled to credit to the extent of such reimbursement against its liability to the petitioner under this decree.

5. The employer shall reimburse Gemma Law Associates the sums of Three Hundred Fifty and 00/100 ($350.00) Dollars for the expert witness fee of Dr. Sidney Migliori and One Hundred Two and 15/100 ($102.15) Dollars for the cost of Dr. Migliori's deposition transcript.

6. The employer shall reimburse Gemma Law Associates the sum of Twenty-five and 00/100 ($25.00) Dollars for the filing fee for the claim of appeal and Two Hundred Seventy-five and 00/100 ($275.00) Dollars for the cost of the trial transcript.

7. The employer shall pay a counsel fee in the amount of One Thousand Two Hundred Fifty and 00/100 ($1,250.00) Dollars to Charles J. Vucci, Esq., for services rendered at the trial level and One Thousand and 00/100 ($1,000.00) Dollars for services rendered before the Appellate Division.

We have prepared and submit herewith a new decree in accordance with the decision. The parties may appear on at 10:00 a.m. to show cause, if any they have, why said decree shall not be entered.

Sowa and Connor, JJ. concur.

ENTER:

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Olsson, J.

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Sowa, J.

_____
Connor, J.

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PROVIDENCE, SC. WORKERS' COMPENSATION COURT
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CRA-MAR NURSING HOME	)	

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the appeal of the petitioner/employee from a decree entered on February 7, 2001.

Upon consideration thereof, the appeal of the petitioner is sustained, and in accordance with the decision of the Appellate Division, the following findings of fact are made:

1. The petitioner has demonstrated, by a fair preponderance of the credible evidence, that she sustained a work-related injury on February 19, 2000, arising out of and in the course of her employment, connected therewith and referable thereto, of which injury the respondent had knowledge.

2. At the time of her injury, the petitioner was employed as a certified nursing assistant, and she sustained her injury while lifting a patient who had fallen.

3. The injury sustained by the employee was a lumbosacral strain and a question of right sacroiliac joint strain.

4. The employee's average weekly wage at the time of her incapacity was Two Hundred and Eighty-three Dollars and six cents ($283.06).

5. The employee has demonstrated by a fair preponderance of the credible medical evidence that she was partially incapacitated from April 21, 2000 and continuing.

6. At the time of her injury, the employee had two (2) persons dependent upon her for support.

7. The employee received some Temporary disability Insurance benefits and a lien has been filed in favor of the Rhode Island Temporary Disability Insurance Fund.

It is, therefore, ordered:

1. The employer shall pay workers' compensation benefits for partial incapacity from April 21, 2000 and continuing until further order of the court or agreement of the parties.

2. The employer shall pay all reasonable medical, hospital and surgical benefits as required under the terms of the Rhode Island Workers' Compensation Act.

3. The employer shall be entitled to credit for all sums paid to the employee pursuant to the terms of a pretrial order and trial decree previously entered in this matter.

4. That the respondent/employer and/or its insurance carrier shall reimburse the Director for the Rhode Island Temporary Disability Insurance Fund in accordance with the provisions of R.I.G.L. §28-41-6(3), and shall be entitled to credit to the extent of such reimbursement against its liability to the petitioner under this decree.

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Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Olsson, J.

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Sowa, J.

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Connor, J.

I hereby certify that copies were mailed to Charles J. Vucci, Esq., and Earl Metcalf, Esq., on

_____